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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. ~~78-1119~~

GABRIEL A. FAZEKAS,
Appellant,

v.

THE UNIVERSITY OF HOUSTON, et al.,
Appellees.

On Appeal From The Court of Civil Appeals For the First Supreme Judicial District of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Gabriel A. Fazekas, the Plaintiff/Appellant, appeals from the final judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, dated March 30, 1978, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. The Defendants/Appellees are the University of Houston, the Regents of the University, and the President of the University.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, which appears in the appendix hereto, is reported at 565 S.W.2d 299 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). (Appendix 35-51).

JURISDICTION

This is a suit to recover damages. It is brought under the Contract and Equal Protection Clauses of the United States Constitution. (Article I, Section 10, and 14th Amendment).[1] On March 30, 1978, the Court of Civil Appeals for the First Supreme Judicial District of Texas rendered and entered its take nothing judgment against the apellant. An application for writ of error (discretionary review) was prosecuted to the Texas Supreme Court, and was refused on September 20, 1978. The Motion for Rehearing of the Application was overruled by the Texas Supreme Court on October 18, 1978.

Notice of Appeal to this Court was filed in the Court of Civil Appeals (the court possessed of the record) on October 30, 1978. The appeal is being docketed in this Court within ninety (90) days from the denial of rehearing in the Texas Supreme Court.

The jurisdiction of this Court to review the decision by direct appeal is conferred by 28 U.S.C. Section 1257(2). Such jurisdiction is sustained by *Hamilton v. Regents of the University of California,* 293 U.S. 245, 55 S.Ct. 197 (1934).

1. Other state law theories were asserted in the state courts and overruled, as were the foregoing federal claims. None of the holdings on state law are complained about here and they do not support the judgment independent of the federal claims since the Plaintiff would be entitled to recover if he is successful under any of the asserted theories.

The judgment of Court of Civil Appeals and the notice of appeal are reprinted in the appendix hereto. The retirement regulations of the University of Houston (statute of a state) involved in this suit are also included in the appendix. (Appendix 52-58).

CONSTITUTIONAL PROVISIONS INVOLVED

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment.

QUESTIONS PRESENTED

(1) Whether a unilateral reduction of the mandatory retirement age from 70 to 65 by a state university impaired the contract of a tenured professor in violation of the Contract Clause (Article I, Section 10).[2]

(2) Whether a unilateral reduction of the mandatory retirement age from 70 to 65 by a state university denied equal protection to a tenured professor in violation of the 14th Amendment.

STATEMENT OF THE CASE

Until September 1, 1977, Plaintiff was Professor of Mechanical Engineering at the University of Houston. He was then forced to retire at the age of sixty-six after thirteen years of service. His forced retirement was precipitated by a change in retirement policy applicable to all employees and not by any deficiency in his per-

2. This question inherently includes the issue of whether the contractual job security supposedly provided to thousands of teachers by the concept of tenure includes a fixed and reliable retirement date.

formance. (H 57, 74, 76). When he was originally employed in 1964, both parties contemplated his retirement at age seventy. This suit was brought to recover the salary and retirement benefits Plaintiff lost by forced early retirement.

How The Federal Questions Were Presented And Passed Upon

Plaintiff first raised the foregoing federal questions in his Original Petition. These claims were carried forward in his First Amended Original Petition (trial pleading). (Tr. 11, 12). The trial court overruled these claims, along with all others, when it sustained all of the defendants' special exceptions to the petition and dismissed the suit, and alternatively, rendered a take nothing judgment against Plaintiff. (Tr. 19, 20).

The federal questions were raised in the Court of Civil Appeals and Texas Supreme Court by assignments of error (Points 8 and 9 of the Brief for Appellant in the Court of Civil Appeals; Points 3 and 4 of the Application for Writ of Error in the Texas Supreme Court). The Court of Civil Appeals reversed the alternative form of judgment rendered by the trial court, but still rendered a take nothing judgment against Plaintiff, thereby overruling all of Plaintiff's claims, including the federal constitutional questions. The opinion of the lower court discussed and decided the federal issues against Plaintiff. (Appendix 42-49). The Texas Supreme Court refused to grant the Application for Writ of Error with the notation that no reversible error had been committed by the Court of Civil Appeals. Both the Court of Civil Appeals and Texas Supreme Court thus considered and rejected the federal constitutional claims.

Chronological Facts

In 1964, the University of Houston contacted Plaintiff and offered him the position of Professor of Mechanical Engineering. Plaintiff did not solicit employment with the University of Houston and had not even heard of the University prior to this contact. He accepted the offer and began serving in the position on September 1, 1964. He was then fifty-three years old. (S.F. 77-78, PX-4, 5, 8, 9, 10).

When Plaintiff was employed (September 1, 1964), the 1959-1960 Faculty and Staff Handbook of the University of Houston was in force. (H 21, PX-11). It provided that Plaintiff was to serve a minimum two-year probationary period as Professor of Mechanical Engineering at the University and would then be eligible for tenure (i.e., continuous appointment). The 1959-1960 Faculty and Staff Handbook further provided:

> "Termination of the employment of a Professor or an Associate Professor with tenure, except by resignation or retirement for age in accordance with regulations, should be only for good cause shown. (Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and that retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.)" (PX-11c).

Plaintiff was granted tenure effective September 1, 1967. (PX-16). On September 1, 1967, the 1967 Faculty and Staff Manual of the University of Houston was in force and contained essentially the same provisions with

regard to termination of a tenured professor as the 1959-1960 Handbook—after having been awarded tenure, Plaintiff could be terminated only for adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies. The 1967 Faculty and Staff Manual further provided:

> "All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation." (H 32, PX-17d).

Plaintiff accepted the University of Houston offer because, among other things, it provided an opportunity to start an entirely new school in mechanical engineering design. He did not intend the move to the University of Houston to be short-term and he would not have accepted the position with retirement at age sixty-five instead of seventy unless a much larger salary was included since he was fifty-three years old at the time of the move. When he came to Houston he arranged his financial affairs around retirement at age seventy. For example, he arranged for a fifteen-year loan to purchase his home which would have been paid in full when he retired at age seventy. He would have made different arrangements if his contract had provided for retirement at age sixty-five. (S.F. 80). After joining the University of Houston, Plaintiff did not accept an offer of employment with Arizona State University because it would have meant forfeiting his accumulated retirement benefits with the University of Houston. (S.F. 81).

While at the University of Houston, Plaintiff was occupied by teaching, advising students and research. (S.F. 83). Several students advised by Plaintiff received national awards for their efforts. Plaintiffs' prodigious research effort was relevant and current, according to his colleagues at the University, and was usually published in the Transactions of the American Society of Mechanical Engineers, one of the most prestigious publications in the field of mechanical engineering. (H 74, K 18, 23, W 11-14). His work has been cited nationally and internationally and his publications have increased during the last several years rather than declined. (S.F. 86-87, K 25, PX-49). Plaintiff also served the American Society of Mechanical Engineers as past chairman of two national committees and a member of a third. (S.F. 88-89).

On November 7, 1972, when Plaintiff was sixty-one years old, the Defendant Board of Regents, on the recommendation of Defendant Hoffman (President of the University), unilaterally lowered the retirement age of all university personnel to sixty-five instead of seventy, effective with the beginning of the regular academic year of 1975-76. The new retirement policy adopted by Defendants was the following:

> "Effective with the beginning of the regular academic year for 1975-1976, all University personnel shall retire at age 65 unless they are invited by the Board of Regents to continue in service. Invitations for continuation of a faculty member normally originate annually within the department or departments in which the faculty member holds an appointment. For the colleges which are not subdivided into departments, the invitation should originate within the college in which the faculty member holds an

appointment. The retirement of University personnel may be requested by the individual prior to age 65." (H 59, PX-27, 28, 29).

In April, 1975, Defendants verbally gave the first individual notice to Plaintiff that he would have to retire at age sixty-five. The first written notice Plaintiff received was approximately three months later on July 17, 1975. He was then sixty-four years old. (S.F. 93-95, K 29-31, W 28, PX-51).

After Plaintiff received notice that Defendants would apply the lower retirement age to him, he filed a grievance with the Cullen College of Engineering at the University, pursuant to the procedure established by the College By-Laws. A hearing was held and a report was issued by the committee condemning the new policy and the procedures followed by Defendants. The report and recommendations were not, however, followed by Defendants. (S.F. 97-98, H 62, PX-32, 33, 34, 35, 36, 37, 38, 39). Instead, Defendants offered Plaintiff a one year extension beyond age sixty-five "as a result of the time that has had to be spent . . . considering his protest and the ensuing uncertainty that Professor Fazekas has been under in planning his immediate future. This one year extension . . . would be for the sole purpose of providing Professor Fazekas with another one year's notice, without any doubt attached to it, of his expected retirement." (S.F. 98, H 66-67, PX-38, 39). Plaintiff accepted the one year reappointment under protest and made it clear to Defendants that he was not thereby agreeing to retire before age seventy. (S.F. 99, PX-79).

On or about May 18, 1976, Defendant Hoffman notified Plaintiff in writing that the Board of Regents

had approved his appointment as Professor of Mechanical Engineering for the 1976-77 academic year, and stated in his letter ". . . your appointment for 1976-77 is a one-year extension beyond the normal retirement age and is non-renewable." (H 69, PX-40).

Plaintiff did not agree to the change of his retirement age. Defendants did not offer and Plaintiff did not accept any additional consideration for the unilateral change in the retirement age, in the form of increased compensation or increased contributions to Plaintiff's retirement account. (S.F. 95). The new retirement policy does not provide for increased compensation or increased retirement contributions for those adversely affected by its terms and it does not include a "grandfather" provision. (H 53-54).

It was impossible for Plaintiff to secure other employment at the age of sixty-six. He had no other offers of employment or sources of income to compensate for the loss of the University of Houston salary and retirement benefits and he doubted that he would be able to meet present financial obligations or maintain his home. (S.F. 90). The parties stipulated that Plaintiff has been damaged in the amount of Eighty-Nine Thousand Two Hundred Fifty-Seven and No/100 Dollars ($89,257.00) and is entitled to recover this amount if liability exists. (S.F. 22, 26, 48).

When the case was called for non-jury trial, Defendants for the first time urged their special exceptions. After reading the pleadings and listening to short arguments by counsel, and before hearing any evidence, the trial court announced it would sustain all of Defendants' special exceptions and render judgment for Defendants,

but would permit the parties to make a full record for appellate review and disposition on the merits if the ruling on the special exceptions is erroneous. During the arguments of counsel, the trial court clearly stated the central reason for its judgment as follows:

* * * * * *

> "I do not hold with the right of a court to perform legislation, which I have indicated. Now, this may indicate some bias on my part, and I want that to be reflected so that there is no difficulty with regard to the final disposition of this case. Realizing that I have made that statement, that's the reason I permitted a full development in this case on the facts." (S.F. 145-146).

After the close of the evidence, the trial court sustained all of Defendants' special exceptions and alternatively, rendered a take nothing judgment against Plaintiff. (Tr. 19).

On March 30, 1978, the Court of Civil Appeals reversed the alternative form of judgment sustaining the special exceptions and dismissing the suit, and rendered judgment that Plaintiff take nothing by his suit. The Texas Supreme Court refused discretionary review by writ of error with the notation that no reversible error had been committed by the Court of Civil Appeals. The Motion For Rehearing of the Application was overruled on October 18, 1978. Notice of Appeal to this Court was filed on October 30, 1978 in the Court of Civil Appeals, which is the court possessed of the record.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Summary

The federal questions in this case involve two contemporary subjects of widespread importance—academic tenure and mandatory retirement.

The concept of tenure in higher education, vital to academic freedom and the quality of education, has been seriously eroded by the Court of Civil Appeals' opinion. Tenure is supposed to provide contractual job security for thousands of teachers, but the lower courts have held that the agreed security does not include a fixed retirement date. Rather, the most important term of the teacher's contract—duration—is indefinite and subject to unilateral change by the employer at any time, regardless of the employee's detrimental reliance on the original termination date. Such a holding frustrates the express purpose of tenure—contractual job security—and permits the University to impair the employment contracts of its tenured faculty. The University could avoid these problems with a grandfather provision, or special financial arrangements for those adversely affected, such as Plaintiff. It could also expressly state that the retirement policy is subject to unilateral change and thereby eliminate any detrimental reliance. Instead, it ignored the legitimate interests and detrimental reliance of those tenured faculty members like Plaintiff who, because of their age, have no alternative but to live with a substantial decrease in income caused by forced retirement years before they had planned to retire.

The lower courts have also held that it is reasonable to force eager, competent and productive teachers into

stagnation on the basis of age alone. Such a waste of human resources should be prohibited by equal protection requirements.

Impairment of Contract

While this case was proceeding up the litigation ladder, this Court decided *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505 (1977) and *Allied Structural Steel Co. v. Spannaus*, ____U.S.____, 98 S.Ct. 2716 (1978) (hereinafter *United States Trust Co.* and *Allied Structural Steel*). The limits imposed on state action by the Contract Clause were reinforced by these two cases, and those limits were exceeded by the University in this case.

The lower court did not reach a step-by-step review of the University's actions under *United States Trust Co.* (*Allied Structural Steel* had not been decided). It decided that the Contract Clause had not been violated because the regulation requiring retirement at age 70 did not, according to the lower court, become a part of the contract between the University and the Plaintiff and thereby insulate the Plaintiff from the effect of a subsequently adopted regulation requiring retirement at an earlier age. This construction of the contract is part of the federal question. The lower court expressly held that the actions of the University "did not violate either the state or the federal constitutional provision against the impairment of contractual rights." (Appendix 49, 565 S.W.2d at 307). Construction of the contract . . . "is so interwoven with the other as not to be an independent matter, . . ." *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164. Cf. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 290. In cases such as this the Court has repeatedly held that it has a "duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below." *e.g., Houston & T. C. R. Co. v. Texas*, 177 U.S. 66, 20 S.Ct. 545, 549 (1900).

Retirement at age 70 was part of the contract and it was substantially impaired by a state law. Before discussing the terms of the contract, it should be noted that the regulations of the University are construed as state laws. Both sides argued in favor of this proposition in the lower courts and it is sustained by many cases. The Court of Civil Appeals treated the regulation as state law in reaching its decision. "Since the Board of Regents of the University of Houston is authorized by statute to exact bylaws, rules and regulations necessary to the government of the University, its rules are of the same force as would be a like enactment of the legislature." (Appendix 42, 565 S.W.2d at 304).

It should also be remembered that the impairment of Plaintiffs contract was unquestionably substantial. He lost his only possible employment, four years' salary, and the increased retirement benefits associated with four additional years of service. The parties stipulated that he had been damaged in the amount of Eighty-Nine Thousand Two Hundred Fifty-Seven ($89,257.00) Dollars.

Whether the retirement age of seventy was part of the contract must be determined from the contract documents and the manifest intent of the parties to the

agreement. The tenure provisions are an integral part of the contract documents and the agreement.

The employment agreement between the parties began with a February 17, 1964 letter to Plaintiff from Douglas Muster who was then Chairman of the Mechanical Engineering Department at the University of Houston. (S.F. 51, PX-4). It provided the "the question of tenure is covered by University regulations. The regulations state, 'Professor. Tenure shall apply only after eight years of successful educational experience, two of which must have been at the University of Houston in this rank.' "

Plaintiff began serving in the position on September 1, 1964, and each year thereafter, until his forced retirement on September 1, 1977, his appointment was reaffirmed in writing by Defendants and accepted by Plaintiff. (PX-12, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 40). Each reaffirmation of the original appointment contained language identical or similar to the following:

> "Subject to all rules and regulations of the University of Houston and all applicable statutes of the State of Texas, Gabriel Fazekas is appointed (or reaffirmed) as Professor of Mechanical Engineering at a salary of $_____ per month for _____ months. Upon acceptance noted hereon, this arrangement becomes effective for the academic year _____."

Various provisions of the Faculty and Staff Manuals in effect when Plaintiff was employed and achieved tenure also became part of the agreement. The rules and regulations contained in these manuals are referred to in the original informal letter of appointment from Douglas Muster (PX-4) and in each of the subsequent reaffirmations of the original appointment. It is important to note that the annual reaffirmations (PX-12, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 40), are simply a continuation of the original agreement and the only change in each one is the salary and schedule of payments for the year. Defendant Hoffman repeatedly confirmed this interpretation. (H 28-29, 33, 37). Numerous cases, as well as the testimony of Defendant Hoffman and of C. V. Kirkpatrick make it abundantly clear that many of the terms of an employment contract between the Defendant University and a faculty member are found in the Faculty and Staff Manuals. (H 22-24, K 16). *International Printing Pressmen and Assistants Union v. Smith*, 198 S.W.2d 729 (Tex. Sup. 1946); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972); *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973); *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969); *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974); *Arlington Indep. School Dist. v. Weekley*, 313 S.W.2d 929 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.); *Roane v. Callisburg Independent School District*, 511 F.2d 633 (5th Cir. 1975).

Two provisions found in the Faculty and Staff Manuals are involved in the present case—tenure and retirement. In language chosen by or for the University, the retirement age is inextricably entwined with the tenure provisions. The two provisions appear in the same paragraph of both the 1959-1960 Handbook and the 1967 Faculty and Staff Manual, which provide respectively:

> "Termination of the employment of a Professor or an Associate Professor with tenure, except by resignation or retirement for age in accordance with regulations, should be only for good cause shown.

(Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and that retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.)" (PX-11c).

"All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation." (H 32, PX-17d).

In each of the Faculty and Staff Manuals, the foregoing provisions are preceded by an express statement of the objective of tenure. The 1959-1960 Manual provides:

"The Board of Governors seeks to promote the welfare of the University by a statement of policy generally to be followed, except in extraordinary circumstances, with respect to the employment of members of the faculty of the University. The Board desires to maintain, commensurate with the ideals of a University of the first class, a learned faculty who by precept and example will instruct and inspire the students. To that end, *competent teachers are given assurance that they may feel secure in their positions* and that they will be promoted upon the basis of merit as circumstances permit. *Unless otherwise specified at the time of appointment, it is the intention of the Board that the term of service of a professor or associate professor will be continued during good behavior and satisfactory service,* after a probationary period as set forth below . . ." (PX-11). (emphasis added)

The Manual then sets out the minimum requirements for the granting of tenure and expressly equates tenure to "continuous appointment". An almost identical provision is found in the 1967 Faculty and Staff Manual which was in force at the time Plaintiff was granted tenure. (PX-17, p. 17). This same provision appears in every Faculty and Staff Manual. For example, see 1972 (PX-30, pp. 28-29) and 1974 (PX-31, p. 29). The tenure requirements are immediately followed by the termination and retirement provisions quoted on the preceding page.

Express written assurance of a secure position and continuous appointment during good behavior and satisfactory service are terms of contract. These terms are rendered meaningless if the provision for retirement at age seventy is not part of the contract because the teacher would only acquire a position secure until the next change in rules or regulations over which he or she has no control.

Defendant Hoffman, President of the University of Houston, testified that he certainly agreed with the reasons for tenure and respected them fully. He stated that "[t]enure is designed to protect faculty members in their freedom of expression, in their freedom from pressures exerted upon them as they undertake to disseminate knowledge and truth within the areas of their discipline and it's essential, in my opinion, for them to have protections against unreasonable pressures in order to properly fulfill these very desirable objectives." He then added that the faculty in furtherance of that objective should feel secure in their position and he believed that tenure is a viable concept and should be continued at the University of Houston. (H 78).

A faculty member cannot feel secure in his or her position if the mandatory retirement age can be unilaterally changed or manipulated by Defendants at any time, which is precisely the contention urged by Defendants in this case. Defendants could theoretically establish any age as the mandatory retirement age and they could use a reduction in mandatory retirement age as a subterfuge to effect the termination of tenured faculty members without showing the required good cause. Such an interpretation would destroy the whole purpose for tenure as stated by Defendants in their own words and publications.

Many authorities hold that teachers' tenure statutes should be liberally construed in favor of the teachers who constitute the class designated as the primary beneficiaries thereof. *State Tenure Commission v. Madison County Board of Education*, 213 So.2d 823; *Lea v. Orleans Parish School Board*, 84 So.2d 610; *School Dist. of City of Royal Oaks v. Schulman*, 243 N.W.2d 673; *State ex rel. Kohr v. Hooker*, 152 N.E.2d 788; *Barendregt v. Walla Walla School Dist. No. 140*, 550 P.2d 525. Still other authorities hold that such statutes should be construed liberally to effect the general purposes of the legislation—stability, certainty, permanency of employment for teachers, and a better education for the students. *Board of Education, Tucson High School Dist. No. 1 v. Williams*, 403 P.2d 324; *State ex rel. Saxtorph v. District Court, Fergus County*, 275 P.2d 209; *State ex rel. Ging v. Board of Education of City of Duluth*, 7 N.W.2d 544; *State ex rel. Tittle v. Covington Community Consol. Schools*, 96 N.E.2d 334.

It is a well established rule of construction that the provisions in a contract must be reconciled and harmon-

ized whenever possible by any reasonable interpretation, so that the contract, as a whole, may be given effect. "An interpretation would not be given to one part of a contract which will annul another part of it." *Mercer v. Hardy*, 444 S.W.2d 593, 595 (Tex. Sup. 1969). *Accord, Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989 (Tex. Sup. 1947); *City of Houston v. L. J. Fuller, Inc.*, 311 S.W.2d 285 (Tex. Civ. App. —Hous. 1958, writ ref'd, n.r.e.). "All written instruments whereby a single transaction is consummated are to be taken and construed together . . . And, if there be inconsistencies and conflicts, they should be construed together so as to give effect to the intention of the parties as collected from the whole contract." *Steadman Credit Co. v. Wade*, 195 S.W.2d 765, 767 (Tex. Civ. App.—Galv. 1946, writ dism'd). When Plaintiff joined the University of Houston and when he was granted tenure, the retirement age was seventy and he was supposed to have a contractural right to feel secure in his position (tenure) until retirement at that age. The contractual right of securty (tenure) continued throughout the time Plaintiff was employed by Defendants, and this part of his contract can be given effect without destroying any other part by the reasonable interpretation that the retirement age in effect when Plaintiff achieved tenure became the retirement term of his contract and could not be changed unilaterally without mutual assent and a sufficient contractual consideration, which were not present in this case.

If we assume that Defendants contractually reserved the power to change the retirement age, which is not the case, of necessity, the courts look to the intent of the contract and have denied effect to exercises of contractually reserved power where the particular action derogates

from that intent or an obligation otherwise inherent in the contract, i.e., where the challenged action defeats the expectations reasonably founded upon the contract. *Wood v. Lucy Lady Duff-Gordon,* 118 N.E. 214 (1917); *Perkins v. Standard Oil Company,* 383 P.2d 107 (1963); *Commercial Credit Corp. v. Nelson Motors, Inc.,* 147 S.E.2d 418 (S.C. 1966).

If Defendants contractually reserved the power to change the retirement age, the provision for retirement at age sixty-five is inconsistent with the contractual provisions regarding job security, i.e., tenure, and retirement at age seventy. The contractual tenure provisions are found in each of the Faculty and Staff Manuals, both before and after the change in retirement age. These provisions are the primary, predominant purpose of the employment contract. As such, the inconsistent provision regarding retirement at age sixty-five rather than seventy must yield to the primary objective of tenure—furtherance of academic freedom through security of position, it is another well recognized rule of contractual construction that in reconciling conflicting provisions of contracts, the provision which contributes most essentially to the contract is entitled to the most consideration. The contract will be construed to effectuate the main purpose and not prevent it. *World Broadcasting System, Inc., v. Bass,* 322 S.W.2d 390 (Tex. Civ. App. Texark. 1958, rev'd on other grounds, 328 S.W. 2d 863 [1959]; *Weaver v. Weaver,* 171 S.W.2d 898 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m); *Hynd v. Sandler,* 95 S.W.2d 165 (Tex. Civ. App.—Dal. 1936, writ dism'd); *Osburn v. Smart,* 58 S.W.2d 1073 (Tex. Civ. App.—Ft. Worth 1932, no writ); 17A C.J.S., *Contracts,* § 321.

In *State of Indiana v. Brand,* 303 U.S. 95, 58 S.Ct. 443 (1938), the Court held that the Teacher's Tenure Act of Indiana defined a contractual relationship and assured the teacher of the possession of a binding and enforceable contract against school districts. The opinion distinguished *Dodge v. Board of Education* (cited by the Court of Civil Appeals) "because the statute there involved did not purport to bind the respondent by contract to the payment of retirement annuities . . ." The terms and intent of the statute held to create a contract in *State v. Brand* are much closer to the present case than that involved in *Dodge v. Board of Education.* The *Brand* opinion states:

> "The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy. Nevertheless, it is established that *a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state or its subdivisions within the protection of Article I, Section 10.*" 303 U.S. at 100, 58 S.Ct. at 446. (emphasis added)

Plaintiff moved to the University of Houston at the age of fifty-three from an institution with no mandatory retirement age, planned his financial affairs around retirement at age seventy, and fully performed his agreement with the University. The provisions of the University Faculty and Staff Manuals regarding tenure and retirement at age seventy were accepted by Plaintiff as the basis of action, and thereby became a contract between Plaintiff and the University of Houston.

The lower court's construction of Professor Fazekas' contract with the University of Houston is inconsistent with the express intent of the parties. It is abundantly clear that Professor Fazekas intended the contract to include a secure position until retirement at age seventy. If the University of Houston did not share this objective, it certainly chose inappropriate language to express its true intentions.

The cases cited by the Court of Civil Appeals do not control if the parties' agreement, including the tenure provisions, calls for retirement at age seventy—and it does. The Court of Civil Appeals quoted from *Dodge v. Board of Education,* 302 U.S. 74, 58 S.Ct. 98 (1937). The next sentence of the *Dodge* opinion following the quotation says "[i]f, upon a construction of the statute, it is found that the payments are gratuities, *involving no agreements of the parties,* the grant of them creates no vested right". (emphasis added) The italicized portion of the quotation is what distinguishes the *Dodge* opinion from this case. We are dealing with an agreement of the parties for a secure position.

City of Dallas v. Trammell, 101 S.W.2d 1009 (Tex. Sup. 1937) did not abrogate the contractual right to participate in the pension fund on the terms prescribed in the Act. In fact, the court said that "it may be conceded that this right to participate in the pension fund, so long as there is such a fund, is one which cannot be destroyed". The terms of the Act created a contractual right to participate in the fund. Likewise, the Faculty and Staff Manuals of the University of Houston created a contractual right of a secure position. A secure position of indefinite duration is a contradiction in terms.

Phelps v. State Board of Education, 180 A. 220 (N.J. Sup. 1935) arose from a reduction of all teachers' salaries due to economic conditions (the Great Depression). Financial exigencies are universally recognized as overriding tenure rights.

Martin v. Smith, 1 N.W.2d 163 (Wis. Sup. 1941) had nothing to do with tenure or whether part of a legislative enactment created contract rights. Neither of these matters were even mentioned, but they are the only issues in the present case.

In *Houghton v. School Committee of Somerville,* 28 N.E.2d 1001 (Mass. Sup. 1940), the teacher was employed "on tenure *at the discretion of the school committee*". Obviously, no contractual right to continued employment is created by such language, and we have no such language in the present case. To the contrary, the Plaintiff was given express assurance that he could feel secure in his position.

State v. Lone Star Gas Company, 86 S.W.2d 484 (Tex. Civ. App.—Austin 1935, writ ref'd) was reversed and remanded by the United States Supreme Court at 304 U.S. 224, 58 S.Ct. 883 (1938). Moreover, it was a utility rate case, having absolutely nothing to do with tenure, contractual obligations arising from statutes, or retroactive application of rules.

Arlington Independant School District v. Weekley, 313 S.W.2d 929 (Tex. Civ. App.—Ft. Worth 1958, writ ref., n.r.e.) and *Romeike v. Houston Independent School District,* 368 S.W.2d 895 (Tex Civ. App.—Waco, 1963, no writ) both dealt with regulations in existence prior to the contract in dispute. Thus, their holding (as opposed to dictum) support the Plaintiff's position here.

In the context of due process, courts have repeatedly held that a tenured teacher, such as Plaintiff, has a property interest in continued employment. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972); *Board of Regents v. Roth*, 93 S.Ct. 2701 (1972); *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973); *Slochower v. Board of Education*, 350 U.S. 551, 76 S.Ct. 637 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952); *Roane v. Callisburg Independent School District*, 511 F.2d 633, 638 (5th Cir. 1975).

The cases relied upon by the Court of Civil Appeals simply do not meet the issue in this case. If express written assurance of a secure position until retirement at a stated age does not create contractual rights, what does it do? The lower court states that by executing the annual reaffirmations of appointment, "Professor Fazekas acknowledged that his contractual rights were subordinant to the rules and regulations issued by the Board of Regents." (Appendix 48). This statement assumes the court's desired answer that all subsequent rules and regulations became part of the contract. If the provision regarding retirement at age seventy was not part of the contract, the provisions regarding tenure are a little more than window dressing. By signing the form, the professor was accepting the college's offer and obligating himself to teach at the college for the next year. He was not waiving vested natural tenurial rights. *La Shells v. Hench*, 98 Cal. App. 6, 276 P. 377 (1929); *Collins v. Parsons College*, 203 N.W.2d 594 (Iowa 1973); *State ex rel. Kennedy v. Ayers*, 108 Mont. 547, 92 P.2d 306 (1939). In *State ex rel. Kennedy v. Ayers*, for example, the plaintiff had executed five annual contract notices, which explicitly incorporated the university's policy that tenure was acquired after 3 years of probationary service. That provision was struck from the sixth contract tendered to him. The plantiff signed the sixth contract although he protested that he had permanent tenure. The Montana Supreme Court held that he had not waived his right to claim permanent status by signing the sixth contract and continuing in the employ of the university. A similiar result is called for here.

There is only one reasonable interpretation of the agreement in this case. Retirement at age seventy became part of the agreement when the plantiff was granted tenure (secure position) and thereafter could not be unilaterally changed by the defendants without the plaintiff's consent and adequate consideration, neither of which were present in this case.

The severe nature of the impairment in this case should "push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel*, 98 S.Ct. at 2723. Since we are dealing with a state's own contract, the impairment should also face more stringent examination than would laws regulating contractual relationships between private parties. *Id.* The unilateral actions of the University of Houston simply exceed the limits imposed by *Allied Structural Steel; United States Trust Company* and *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934). There is no declared emergency and the "basic societal interest" of a "younger, more vigorous faculty" was articulated for the first time in trial pleadings. There has been no evidence showing the state's purpose and how the challenged action relates to that purpose. The University of Houston alleged that the

objective was a younger, more vigorous faculty, but offered no evidence in support of the allegation. Likewise, there was no showing of how the challenged action relates to the articulated purpose. Less destructive alternatives are available. The University of Houston could have easily avoided the problems in this case by a grandfather provision in the new retirement policy, or by special financial arrangements in the form of increased compensation for faculty members such as plaintiff, or by offering some combination of these two alternatives to faculty members such as plaintiff who by their acceptance would modify their original employment contract. All of these alternatives are still available to the University for other tenured professors.

Denial of Equal Protection

Plaintiff alleged a denial of equal protection in the following language:

> "(b) Denial of Equal Protection—Defendants arbitrarily created unreasonable classifications of employees with the sole purpose and effect of unequal treatment on the basis of age. Pursuant to such classifications, Plaintiff and those employees adversely affected by the attempted change in the contractual retirement policy are denied the benefits of their prior contracts and years of service by means of a retroactively applied change in University policy, while those employees not adversely affected by the attempted change in the contractual retirement policy suffer no such deprivation of benefits. Also pursuant to such classifications, Defendants discriminate against Plaintiff and all other employees over the age of 65 solely on the basis of age with no consideration of criteria relating to past and present performance, meritorious service or future potential, while the employment of those under the age of 65 is continued on a merit basis without regard to age. Neither such classification is rationally related to or promotes a compelling or even legitimate state interest." (Tr. 11, 12).

The Court of Appeals used the current equal protection test having only two standards of analysis, strict scrutiny and mere rationality. It then held that age is not a suspect class and the right to work is not a fundamental right. The rationality test therefore applied. Finally, a younger, more vigorous faculty was held to be a legitimate state interest and retirement at age sixty-five was held to be rationally related to that interest. We are not suggesting that age is a suspect classification. We are suggesting that the right to work is a fundamental right requiring strict scrutiny. Even under the current rationality test followed by the lower court, a legitimate state interest is required. Quality teachers and quality education are legitimate state interests. A younger, more vigorous faculty, which was articulated for the first time in Defendants' trial pleadings, is not a legitimate state interest; and even if it is assumed to be legitimate, no evidence was offered by Defendants in support of the allegation.

In an equal protection and mandatory retirement context, this Court has said that the right to work is not a fundamental right and that age is not a suspect classification requiring strict scrutiny and a compelling state interest for justification. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The Court instead applied the rational-basis standard.

The Right to Work is Fundamental

The *Murgia* opinion includes the following:

> "This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental. See San Antonio Independent School District v. Rodriguez, supra; Lindsey v. Normet, 405 U.S. 56, 73, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972); Dandridge v. Williams, supra, 397 U.S. at 485, 90 S.Ct. at 1162. Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.' Ibid." 96 S.Ct. at 2566.

Two aspects of this quotation are important. First, we are presently dealing with more than a right of governmental employment *per se*, because once terminated at the age of sixty-five, it is virtually impossible to find alternative employment. Thus, the right to any gainful employment is actually involved. Secondly, the cases cited in the foregoing quotation do not support the conclusion that the right to work is not fundamental. *San Antonio Independent School District v. Rodriguez* dealt with the dual system of public school financing in Texas. *Lindsey v. Normet* involved the "need for decent shelter" and the "right to retain peaceful possession of one's home" in the context of the Oregon Forcible Entry and Wrongful Detainer Statute. *Dandridge v. Williams* was an action to invalidate a regulation of the Maryland Department of Public Welfare which placed an absolute limit of $250 per month on the amount of a grant regardless of the size of the family and its actual need. The case dealt with the administration of public welfare assistance and not the right to work. It is from *Dandridge* that the

Court in *Murgia* takes the statement that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities". But the cases cited by the *Dandridge* court for this proposition did not deal with mandatory retirement or a denial of the right to work altogether. One case restricted bartending by women, *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198 (1948), and the other case dealt with state statutes regulating the appointment of river port pilots, *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 330 U.S. 552, 67 S.Ct. 910 (1947). Thus, none of the cases relied upon in *Murgia* support the conclusion that the general right to work is not fundamental or the conclusion that a standard less than strict scrutiny should be applied when the right to work is denied altogether.

To the contrary, the Court has called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure". *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10 (1915). In the *Slaughterhouse Cases*, Justice Bradley wrote that this right "is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . This right is a large ingredient in the civil liberty of the citizen". 111 U.S. 746, 762, 4 S.Ct. 652, 657 (1884) (Concurring Opinion). In *Smith v. Texas*, 233 U.S. 630, 34 S.Ct. 681 (1914), the Court stated that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families". 233 U.S. at 641, 34 S.Ct. at 684. The opinion continues:

> "In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages

> and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. Id., at 636, 34 S.Ct., at 682."

See also Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); *Slochower v. Board of Higher Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); *Truax v. Raich, supra,* 239 U.S. at 41, 36 S.Ct., at 10.

Plaintiff submits that while a right of governmental employment *per se* may not be fundamental, the right to work at some gainful occupation is fundamental and nothing in the foregoing cases calls for a contrary conclusion. The practical effect of mandatory retirement at age sixty-five is a denial of any employment, and any state action calling for this result should be subject to strict scrutiny and require a compelling state interest for justification.

Defendants Do Not Satisfy the Current Rationality Test

Even if the present two-tier equal protection framework remains and the right to work is not fundamental,

Defendants' policy of mandatory retirement for everyone at the age of sixty-five is not rationally related to a legitimate state interest. In *Murgia,* the plaintiff was involuntarily retired from the uniformed branch of the Massachusetts state police, pursuant to a statute setting the mandatory retirement age at fifty, through which the Legislature sought to protect the public by assuring physical preparedness of its uniform police. The Court held that "since physical ability generally declines with age, mandatory retirement at fifty serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the state's objective". 96 S.Ct. at 2567-68. But the following appears in a footnote to the dissent:

> "The Court's conclusion today does not imply that all mandatory retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dexterous workforce. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today." 96 S.Ct. at 2573.

This footnote appears to be supported by the majority opinion with language such as "nor do we denigrate the ability of elderly citizens to continue to contribute to society. . . . We decide only that the system enacted

by the Massachusetts Legislature does not deny appellee equal protection of the law". 96 S.Ct. at 2568.

Quality teachers and quality education are legitimate state interests. A younger, more vigorous faculty, which was articulated for the first time in trial pleadings, is not a legitimate state interest. Even if we assume a legitimate state interest, there has been no evidentiary showing of the state's purpose and how the challenged action relates to that purpose. The University of Houston alleged that the objective was a younger, more vigorous faculty, but offered no evidence in support of the allegation. The evidence presented by Plaintiff shows that mandatory retirement at age sixty-five is not rationally related to quality teachers, a more vigorous faculty, or quality education. This Court should not uphold as constitutionally valid a classification of public school teachers based upon age without a showing that it rationally furthers some identifiable and articulable state purpose. *Gault v. Garrison,* 569 F.2d 993 (7th Cir. 1977). The University of Houston failed to make any showing in support of its allegation.

The proper remedies for the denial of equal protection in this case are a declaration that the attempted change of the contractual retirement policy of the University of Houston by Defendants, and its subsequent application to Plaintiff, are unconstitutional in both form and application, and damages in the amount of $89,257 as stipulated by the parties. Both remedies are prayed for in Plaintiff's First Amended Original Petition. (Tr. 13) During trial, the parties stipulated that if there is liability and Plaintiff is entitled to recover, his recovery would be in the stated amount. (S.F. 22, 26, 48) There are

numerous recent cases which support the proposition that arms of the government (in this case the University of Houston) may be sued under the Constitution for damages. The cases start with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999 (1971) and are followed by *Brault v. Town of Milton,* 527 F.2d 730 (2nd Cir. 1975) (action filed by landowners against a municipality for its alleged infringement of their constitutional rights); *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3rd Cir. 1974) (action against college for dismissal of professor without a hearing); *Roane v. Callisburg Independent School District,* 511 F.2d 633 (5th Cir. 1975) (action against school board for alleged wrongful termination of employment); *Hanna v. Drobnick,* 514 F.2d 393 (6th Cir. 1975) (class action against City and employees for alleged unconstitutional searches of homes under building inspection ordinance); *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569 (7th Cir. 1975) (action against college and college board for alleged wrongful termination of employment); and *Miller v. County of Los Angeles,* 341 F.2d 964 (9th Cir. 1965) (action against the County for damages resulting out of a tax sale of Plaintiff's property without due process).

The issues involved in this equal protection argument are complicated and have far-reaching implications, but they are also fundamental and of continuing importance to an ever-growing percentage of the population. As such, they deserve periodic reconsideration.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of general public importance. It is submitted that this Court should grant plenary consideration, with briefs on the merits and oral argument, and reverse the judgment below.

Respectfully submitted,

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APPENDIX A

(OPINION)

NO. 17072

GABRIEL A. FAZEKAS, Appellant

v.

UNIVERSITY OF HOUSTON ET AL,
Appellees

Appeal from the District Court,
Harris County

This suit was instituted by Gabriel A. Fazekas for the purpose of recovering salary and retirement benefits denied him by reason of the adoption by the University of Houston of a regulation requiring retirement at age 65. The case was tried to the court and at the conclusion of the evidence, the court sustained special exceptions which he had carried with the case and on the plaintiff's refusal to amend, entered a judgment dismissing the case and, alternatively, rendered a take nothing judgment against the plaintiff.

The plaintiff asserted causes of action for breach of contract; denial of due process and equal protection under the Fourteenth Amendment to the United States Constitution; impairment of the rights and obligations of plaintiff's contract under Article I, Section 10 of the United States Constitution; deprivation of civil rights pursuant to 42 U.S.C., Section 1983; and denial of rights and privileges guaranteed by the Bill of Rights of the Texas Constitution.

The defendant first excepted to the plaintiff's petition for the reason that the court lacked jurisdiction to hear

the alleged cause of action because the action was one against the State and it was not alleged that plaintiff had received legislative permission to institute the suit.

The court erred in sustaining this special exception. Section 111.33 of the Texas Education Code grants legislative consent to sue the University of Houston. This section provides that the Board of Regents has the power to sue and be sued in the name of the University of Houston. Section 111.33 was derived from Section 3 of the Acts of 1961, 57th Legislature, Ch. 370, P. 811, which included the specific language "legislative consent to such suits is hereby granted." The quoted language was not carried forward into the Code in express terms. Provisions for institutions of higher education were not included in the original Education Code, but they were added by the 62nd Legislature. Acts 1971, 62nd Leg., Ch. 1024, p. 3072. In addition to restating the statutes governing institutions of higher education, this legislation provides: "Paragraph Sec. 2. LEGISLATIVE INTENT. This is intended as a recodification only and no substantive changes are intended by this legislation."

The language "no substantive changes are intended by this legislation" carries forward the language "legislative consent to such suits is hereby granted" into the Code.

The other special exceptions present the question whether as a matter of law the plaintiff's petition states an enforceable claim, and is analogous to the old general demurrer. The pleading attacked must be liberally construed, as a whole, in such a way as to do substantial justice. For the purpose of ruling upon the exceptions, the court must accept as true all material factual propositions alleged, whether they be evidentiary or in the form of

factual conclusions, as well as all factual propositions which, by fair implication, reasonably can be inferred from the allegations. Allegations of fact will not be considered true where in conflict with other allegations which negative them, or with facts which the parties stipulate may be considered in ruling on the exceptions, or with facts which are settled by conclusive presumptions arising from the facts admitted, or with facts of which the court takes judicial notice. 1 McDonald, Texas Civil Practice (1970), Vol. 3, Section 10.14.2. Certain material allegations of the plaintiff's petition will be summarized.

Plaintiff entered into a contract of employment with the Uniersity of Houston by the terms of which he was to serve in the position of Professor of Mechanical Engineering. The employment contract incorporated all provisions of the 1959-1960 Faculty and Staff Handbook of University of Houston then in force. The agreement expressly incorporated those provisions relating to faculty tenure and termination procedures, pursuant to which plaintiff was to serve a minimum two year probationary period in the agreed position at the University and would then be eligible for tenure (i.e., continuous appointment). After tenured status was achieved, plaintiff was assured of continuous employment until retirement at age 70. Termination of the employment of a professor with tenure, except by resignation or retirement for age in accordance with the regulations in force on the contract date, could be only for good cause shown.

The petition further alleges that plaintiff was granted tenure effective September 1, 1967. The 1967 Faculty and Staff Manual of the University of Houston then in force contained essentially the same provision with regard to termination of a tenured professor as the 1959-

1960 Handbook. The retirement policies then applicable and incorporated by the parties agreement provided:

> "All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation."

On November 7, 1972, the Board of Regents of the University revised the contractual retirement policy applicable to plaintiff by lowering the retirement age of all University personnel to 65, effective with the beginning of the regular academic year for 1975-1976. Plaintiff was notified in writing on May 18, 1976, that the Board of Regents had approved his appointment as Professor of Mechanical Engineering for the 1976-77 academic year. The writing specified that this appointment is a "one year extension beyond normal retirement age and is non-renewable". As a result, plaintiff was required to retire at age 66 rather than continuing in employment to age 70.

The defendants excepted to the petition for the reason that every contract entered into by the State of Texas is subject to the implied condition that its fulfillment may be frustrated by the proper exercise of state police power. The defendants further excepted to plaintiff's petition for the reason that no breach of contract was shown since the action of the Board of Regents in lowering the age for retirement of all University employees to 65 years was authorized by the contract provision reading "the retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies

herein stated are subject to this regulation." The exception states that the action of the Board of Regents in lowering the age for retirement constituted a request by the Board to all employees, including plaintiff, to retire at the age 65.

The exceptions were improperly sustained. Evidence was needed to show that the contract in question was frustrated "by the proper exercise of state police power". The proposition urged is merely a defense to the claimed breach of contract. The provision of the contract empowering the University to request retirement between the ages of 60 and 70 does not necessarily authorize it to require retirement before the age of 70. This provision should be construed in light of the circumstances existing at the time of the execution of the contract. The trial court is not authorized to resolve disputed issues of fact and then to use the fact established as the basis for a ruling of an exception to the petition. Issues of fact were presented by the alleged deprivation of constitutional rights. The trial court erred in sustaining the special exceptions and in entering judgment dismissing the petition.

The ruling on the exceptions was made at the conclusion of the trial and a full record is before this court. There can be but one final judgment in this case. The judgment dismissing the case is not conditional. The alternative judgment is not effective as a judgment. Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex. 1968). The judgment entered by the court is erroneous and must be reversed. Rule 434, T.R.C.P., requires this court to render such judgment as the trial court should have rendered. The parties have briefed points attacking the judgment on the merits. We will

proceed to consider the case on the points raised in appellant's brief. Zeisler v. Zeisler, 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd).

The University of Houston is an institution of higher learning created and supported by the State of Texas Chapter 111, Texas Education Code; The Appropriations Act, Acts 1977, 65th Legis., Ch. 872, Art. IV, page 3064. The concept of "tenure" is not statutorily addressed and the University is free to adopt or reject a tenure policy. When the plaintiff was employed by the University as a faculty member in 1964, the pertinent faculty and staff handbook (1959-60 edition) contained a tenure provision which provided:

> "Termination of the employment of a professor or an associate professor with tenure, except by resignation or retirement for age in accordance with the regulations, should be only for a good cause shown. (Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and that retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.) In each case of termination for cause other than resignation or retirement the issue will be determined by an equitable procedure affording protection to the rights of the individual and to the interest of the University."

Appellant was granted tenure effective September 1, 1967, at which time the 1967 Faculty and Staff Manual was in force and provided with respect to tenure:

> "After the expiration of a probationary period, faculty members are awarded tenure by the President and their service will be terminated only for an adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies."

The 1967 Manual further provided:

> "All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation."

The 1972 Faculty and Staff Manual included the following provisions:

> "Tenured faculty members will be terminated only for adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies."
>
> "Effective September 1, 1975, all faculty members shall retire at age 65 unless they are invited by the Board of Regents to continue in service. Invitations for continuation of a faculty member normally originate annually within the department or departments in which the faculty member holds an appointment. . . . The retirement of University personnel may be requested by the individual prior to age 65."

Throughout appellant's service with the University, he accepted and signed, at the beginning of each academic year, appointment forms which set out the amount of compensation and noted the appointment was:

> "Subject to all rules and regulations of the University of Houston and all applicable statutes of the State of Texas."

The law establishing the University of Houston has been codified in Chapter 111 of the Texas Education Code. It provides that the organization and control of the university are vested in a board of nine regents. The board of regents is authorized to appoint and remove any faculty member or other officer or employee of the university when, in its judgment, the interest of the university requires it. All contracts of the university must be approved by a majority of the board. The board is specifically authorized to enact bylaws, rules, and regulations necessary for the successful management and government of the university.

Since the Board of Regents of the University of Houston is authorized by statute to enact bylaws, rules and regulations necessary to the government of the University, its rules are of the same force as would be a like enactment of the legislature. The powers of all state officers are fixed by law, and all persons dealing with them are charged with notice of the limits of their authority and are bound at their peril to ascertain whether the contemplated contract is within the power conferred. State v. Ragland Clinic-Hospital, 159 S.W.2d 105 (Tex. 1942); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805, 86 ALR 477 (1932).

There can be no question but that properly authorized officers of the State of Texas can enter into a contract for services to be performed for the state. Such a contract is protected by Section 16, Article I, of the Constitution of the State of Texas which provides that no "law impairing the obligation of contracts, shall be made" and also by Section 10, Article I of the Constitution of the United States. Johnson v. Smith, 246 S.W. 1013 (Tex.

1922); Farmers Life Insurance Company v. Wolters, 10 S.W.2d 698 (Tex. Comm. App. 1928).

The "Bill of Rights" of the Texas Constitution is embodied in Article I thereof. Section 29 of that Article reads:

> "To guard against transgressions of the high powers herein delegated, we declare that everything in the "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto or to the following provisions, shall be void."

Section 16 of Article I of the Texas Constitution provides that no law impairing the obligation of a contract shall be made.

The police power of this State is broad and comprehensive; but the Constitution forbids its exercise when the result would be the destruction of the rights, guarantees, privileges, and restraints excepted from the powers of government by the Bill of Rights. Travelers Insurance Company v. Marshall, 76 S.W.2d 1007 (Tex. 1934).

The statutory provisions pertaining to plaintiff's employment with the University of Houston are necessarily a part of his contract of employment and are read into his contract as fully as though they had been actually incorporated in it. Devon v. City of San Antonio, 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd). For reasons to be discussed hereinafter, the provision of the rules and regulations regarding tenure is not dispositive of this case. The real question is whether or not the regulation adopted by the Board requiring retirement at the age 70 becomes a part of the contract between

the University of Houston and the plaintiff and thereby insulates the plaintiff from the effect of a subsequently adopted regulation requiring retirement at an earlier age.

The Act creating the University of Houston specifically granted the Board of Regents rule-making power. The authority to make rules implies a power to modify or change rules. The provisions requiring retirement at age 70 does not constitute a contractual limitation on the power of the Board of Regents to determine that an earlier retirement age is in the best interest of the University. The Faculty Handbook specifically provides that after faculty members are awarded tenure by the president their service will be terminated only for adequate cause except in the case of retirement for age. The provision in the rules that a faculty member "shall be" retired at age 70 is a limitation on the contractual rights granted to the Professor rather than a limitation on the power of the Board of Regents. The legislative power granted the Board of Regents by the Act creating the University of Houston cannot be bartered away.

In Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 98 (1937), the court said:

> "In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state, the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. This is true

> also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.—"

In City of Dallas v. Trammel, 101 S.W.2d 1009 (Tex. 1937), the court said:

> "In our opinion, the rule that the right of a pensioner to receive monthly payments from the pension fund after retirement from service, or after his right to participate in the fund has accrued, is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the Legislature to abolish the pension system, or diminish the accrued benefits of pensioners thereunder, is undoubtedly the sound rule to be adopted."

In Phelp v. State Board of Education, 180 A. 220 (Sup.Ct. N.J. 1935, affirmed sub-nominee Askam v. Board of Education, 184 A. 737 (Ct. Err. & App. N.J., 1936), the Supreme Court said:

> "The Act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subject to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. . . . The status of tenure teachers, while in one sense perhaps contractural, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change. . . ."

An interesting statement appears in the case of Martin v. Smith, 239 Wisconsin 314, 1 N.W.2d 163 (1941), where the Supreme Court was considering the question of whether the presidency of the university is a public office and, in connection therewith, was considering a statute governing the University of Wisconsin. The Wisconsin statute provided that the board of regents shall enact laws for the government of the university. The statute also specifically provided that the board should have the power to remove the president or any professor, instructor or officer of the university when, in the judgment of the board, the interest of the university require it. After commenting upon this statutory power of the board, the court said:

> ". . . The president serves only so long as in the judgment of the Board of Regents the interest of the University do not require his removal. There is vested in the Board by this clause of the statute a power of removal that is absolute. It need not be for cause and when the President accepts an election to the presidency, he accepts it subject to the statutory authority of the Board."

In Halton v. School Committee of Sommerville, 28 N.E.2d 1001 (Sup.Jud.Ct.of Mass. at Middlesex, 1940), the court considered the effect of a rule adopted by the school committee denying employment to married women teachers on the rights of such a teacher who was employed in the public schools of Sommerville on "tenure at the discretion of the school committee". The court said:

> "The rule is not unconstitutional as impairing the obligation of the petitioner's contract of employ-

> ment. Therein employment 'at discretion' was always subject to policy-making powers of the committee, to such rules as they might adopt in pursuance of those powers, and to the power of dismissal expressly set forth in the governing statute itself. . . ."

A similar principle was recognized in State v. Lone Star Gas Company, 86 S.W.2d 484 (Tex. Civ. App.—Austin 1935, writ ref'd), where the court said:

> "The right of the state to regulate the rates and practices of a public utility is referable to the police power of the state, and is a legislative function which cannot be alienated or contracted away by the state or any agency or political subdivision of the state. The constitution and laws of a state are a part and parcel of the terms of a corporate franchise, and the right of the state in the exercise of its police power to change franchise or contract rates in the protection of the inalienable rights and general welfare of its citizens is settled. . . ."

Professor Fazekas accepted his appointment to the faculty of the University of Houston and thereby entered into the contract with the University of Houston, which was subordinate to the rules and regulations adopted by the Board of Regents to govern the affairs of that institution. Arlington Independent School District v. Weekley, 313 S.W.2d 929 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.); Romeike v. Houston Independent School District, 368 S.W.2d 895 (Tex. Civ. App.—Waco 1963, no writ history).

The Act establishing the University of Houston provided that the authority to enter into contracts on behalf of the University rested in the Board of Regents.

On June 5, 1965, Professor Fazekas signed an instrument reading:

> "The Board of Regents has approved the following:
>
> Subject to all rules and regulations of the University of Houston and all applicable statutes of the State of Texas Gabriel Fazekas is appointed (or reaffirmed) as Professor of Mechanical Engineering at a salary of $1575.00 per month for nine months.
>
> Upon acceptance noted hereon, this arrangement becomes effective for the academic year 1965-66.
>
> Immediately upon acceptance, please route a signed copy of this form through (1) the appropriate departmental chairman, (2) Dean or Director, to (3) the personnel services office. Signed: Philip G. Hoffman, President. Accepted: Gabriel A. S. Fazekas"

Each year thereafter Professor Fazekas executed an instrument identical in terms with the exception of the salary. The words "subject to", used in their ordinary sense, means "subordinate to", "subservient to" or "limited by". There is nothing in the use of the words "subject to", in their ordinary use, which would even hint at the creation of affirmative rights. Kokernot v. Caldwell, 231 S.W.2d 528, 531 (Tex. Civ. App.—Dallas 1950, writ ref'd).

By executing these instruments, Professor Fazekas acknowledged that his contractual rights were subordinate to the rules and regulations issued by the Board of Regents.

The minutes of the regular meeting of the Board of Regents for November 7, 1972, recite:

> "The Ad Hoc Committee for revisions to the faculty and staff handbook has recommended that the present retirement policy be revised. Upon the endorsement of the faculty senate, and after due consideration by the administration, the President recommended the approval of the proposed revision in the retirement policy. This change lowers retirement age of all University personnel to 65 instead of 70, with exceptions being made by invitation of the Board of Regents."

The minutes reflect that the revised retirement policy was unanimously adopted by the Board of Regents. The new policy became effective September 1, 1975. Professor Fazekas' appointment as a professor was reaffirmed for one year following the effective date of the new retirement policy. He was then required to retire, and his tenure was terminated by reason of retirement. This action did not violate either the state or the federal constitutional provision against the impairment of contractual rights.

The plaintiff also asserts that the defendant denied plaintiff equal protection of the law by arbitrarily creating an unreasonable classification of employees with the sole purpose and effect of unequal treatment on the basis of age. The Supreme Court of Texas spoke to this question in Texas Woman's University v. Chayklintaste, 530 S.W.2d 927 (Tex. 1975), where the court stated:

> "The age classification is constitutionally permissible if it is reasonable, not arbitrary, and rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be

> treated alike.' Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). When no suspect catagories are involved, any rational basis may justity the classification. Johnson v. Robinson, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); McGinnis v. Royster, 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973)."

A retirement policy adopted by an independent school district requiring retirement at age 62 was upheld by the Court of Civil Appeals in King v. Board of Trustees, 555 S.W.2d 925 (Tex Civ. App.—El Paso 1977, no writ history). The court relied upon the Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), where the court considered a statute providing for mandatory retirement of uniform police officers at age 50. There the United States Supreme Court held that the statute did not deny equal protection in violation of the Fourteenth Amendment of the United States Constitution. It further held that the strict scrutiny approach of the legislative classification was not required since the legislative classification interefered with neither fundamental rights nor did it create a "suspect classification". The court pointed out that it had consistently applied a standard less than that of strict scrutiny to state legislation restricting the availability of employment opportunities.

The purpose for changing the retirement age was to secure for the University a "younger, more vigorous faculty." The appellant with admirable frankness has stated the current status of the law in these words:

> "The current equal protection test followed by both federal and Texas courts has two standards

> of analysis, strict scrutiny and mere rationality. If state action invades a 'fundamental right' or discriminates against a 'suspected' class, it is subject to strict scrutiny. If state action is subject to strict scrutiny, it always, or nearly always is struck down. All remaining legislation is measured by the mere rationality test where the challenged activity is always upheld."

Retirement at age 65 is rationally related to the objective, "a younger, more vigorous faculty." The Supreme Court of this State adheres to the rationality test. We find the age classification to be reasonable and not arbitrary and, therefore, constitutionally permissible. Johnson v. Lefkowitz, ____F.2d____, 16 FEP Cases 239 (2nd Cir. 1977) c.f., Gault v. Garrison, ____F.2d____, 16 FEP Cases 245 (7th Cir. 1977).

The judgment of the trial court is reversed and judgment is rendered that the plaintiff take nothing by his suit.

/s/ TOM F. COLEMAN
Chief Justice

Judgment rendered, and opinion filed March 30, 1978.

APPENDIX B

COPY OF JUDGMENT

NO. 17072

GABRIEL A. FAZEKAS

v.

UNIVERSITY OF HOUSTON, ET AL.

Appeal from District Court of Harris County. (Tr. Ct. #1,092,882) Opinion delivered by Chief Justice Coleman.

This cause, being an appeal from the judgment rendered and entered by the court below on August 29, 1977, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed. And because it is further the opinion of this Court that the judgment of the court below should have been in favor of defendants and against the plaintiff, and this Court here now proceeding to render such judgment as should have been rendered by the court below:

It is therefore ORDERED, ADJUDGED and DECREED that plaintiff, Gabriel A. Fazekas, take nothing by reason of his suit herein against the defendants, the University of Houston, Aaron J. Farfel, J. A. Elkins, Mrs. Gus S. Wortham, Leonard Rauch, J. Davis Armistead, Robert L. Grainger, Travis C. Johnson, Willie C. Wells and Mack H. Hannah, individually and in their

official capacity as members of the Board of Regents of the University of Houston, and Philip G. Hoffman, individually and as President of the University of Houston.

It is further ordered that the appellant, Gabriel A. Fazekas, and his surety, pay all costs incurred in this cause, both in this Court and in the court below.

It is further ordered that this decision be certified below for observance.

APPENDIX C

NO. 17,072

IN THE COURT OF CIVIL APPEALS
FOR THE FIRST SUPREME JUDICIAL
DISTRICT OF TEXAS
SITING AT HOUSTON

GABRIEL A. FAZEKAS, Appellant,

v.

THE UNIVERSITY OF HOUSTON, ET AL.,
Appellees.

(Filed October 30, 1978)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gabriel A. Fazekas, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, rendered and entered in this action on March 30, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ MICHAEL T. POWELL
Michael T. Powell

SEARS AND BURNS
823 Two Houston Center
Houston, Texas 77002
(713) 654-4454

Counsel for Appellant

PROOF OF SERVICE

I hereby certify that on the 27th day of October, 1978, one copy of the attached and foregoing Notice of Appeal was deposited in a United States Post Office or mail box, with first class postage prepaid, addressed to Hon. John L. Hill, Attorney General, and Hon. Lonny F. Zwiener, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711. I further certify that all parties required to be served have been served.

/s/ MICHAEL T. POWELL
Michael T. Powell

823 Two Houston Center
Houston, Texas 77002
(713) 654-4454

Counsel for Appellant

APPENDIX D

Faculty and Staff Handbook (1959-60 Edition)

"The Board of Governors seeks to promote the welfare of the University by a statement of policy generally to be followed, except in extraordinary circumstances, with respect to the employment of members of the faculty of the University. The Board desires to maintain, commensurate with the ideals of a University of the first class, a learned faculty who by precept and example will instruct and inspire the students. To that end, competent teachers are given assurance that they may feel secure in their positions and that they will be promoted upon the basis of merit as circumstances permit. Unless otherwise specified at the time of appointment, it is the intention of the Board that the term of service of a professor or associate professor will be continued during good behavior and satisfactory service, after a probationary period as set forth below . . ."

"Termination of the employment of a professor or an associate professor with tenure, except by resignation or retirement for age in accordance with the regulations, should be only for a good cause shown. (Note: Regulations provide that all University employees shall retire at age 70 unless invited by the Board to continue in service, and that retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein outlined are subject to this regulation.) In each case of termination for cause other than resignation or retirement the issue will be determined by an equitable procedure affording protection to the rights of the individual and to the interest of the University."

APPENDIX E

1967 Faculty and Staff Manual

"After the expiration of a probationary period, faculty members are awarded tenure by the President and their service will be terminated only for an adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies."

"All University employees shall retire at age 70 unless they are invited by the Board to continue in service. The retirement of any employee may be requested by him or by the University between the ages of 60 and 70. Tenure policies herein stated are subject to this regulation."

APPENDIX F

1972 Faculty and Staff Manual

"Tenured faculty members will be terminated only for adequate cause, except in the case of retirement for age, or for circumstances due to financial exigencies."

"Effective September 1, 1975, all faculty members shall retire at age 65 unless they are invited by the Board of Regents to continue in service. Invitations for continuation of a faculty member normally originate annually within the department or departments in which the faculty member holds an appointment. . . . The retirement of University personnel may be requested by the individual prior to age 65."